IN THE

Supreme Court of the United States

October Term, 1948.

No. 727

ELY A. TODOROW and LEONARD A. POTOLSKI,

Petitioners,

vs.

UNITED STATES OF AMERICA,

Respondent.

Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit and Brief in Support Thereof.

MORRIS LAVINE,
620 Bartlett Building, Los Angeles 14,
Attorney for Petitioners.

Parker & Company, Law Printers, Los Angeles. Phone MA. 6-9171.

SUBJECT INDEX

PAGE

TABLE OF AUTHORITIES CITED.

STATUTES

TEXTBOOKS

IN THE

Supreme Court of the United States

October Term, 1948

No. .....

ELY A. TODOROW and LEONARD A. POTOLSKI,

Petitioners,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT.

To the Honorable Fred M. Vinson, Chief Justice, and to the Associate Justices of the Supreme Court of the United States:

Your petitioners, Ely A. Todorow and Leonard A. Potolski, respectfully petition this Honorable Court for a writ of certiorari directed to the United States Court of Appeals for the Ninth Circuit, to review the judgments of conviction for violation of the so-called False Claim Statute (Title 18, Sec. 80, U. S. C.), of two honorably discharged war veterans; and in respect thereto your petitioners set out as follows:

Jurisdiction.

Jurisdiction is conferred by Title 28, Sections 1254(1) and 2101, U. S. C., and by Rule 38 of the Rules of the Supreme Court of the United States.

The defendants were convicted in the District Court of the United States for the Southern District of California, Central Division. Judgment was pronounced against them on May 9, 1947 [R. 41-44]. Notice of appeal was duly and regularly filed [R. 45]. The judgment was affirmed by the Court of Appeals for the Ninth Circuit on February 15, 1949; the opinion being written by a district court judge, sitting on the circuit court. Petition for rehearing was duly filed with said Court and within the time allowed by law, and said petition was denied on March 18, 1949. The Court stayed the mandate in said cause pending decision by the United States Supreme Court on writ of certiorari.

Opinion Below.

The opinion of the Court below is to be found at pages 396-415 of the Record.

Statutes Involved.

Title 18, Section 80, U. S. C., 1946, provides as follows:

> "Whoever shall make or cause to be made or present or cause to be presented, for payment or approval, to or by any person or officer in the civil, military, or naval service of the United States, or any department thereof, or any corporation in which

the United States of America is a stockholder, any claim upon or against the Government of the United States, or any department or officer thereof, or any corporation in which the United States of America is a stockholder, knowing such claim to be false, fictitious or fraudulent; or whosoever shall knowingly and wilfully falsify or conceal or cover up by any trick, scheme, or device a material fact, or make or cause to be made any false or fraudulent statements or representations, or make or use or cause to be made or used any false bill, receipt, voucher, roll, account, claim, certificate, affidavit, or deposition, knowing the same to contain any fraudulent or fictitious statement or entry in any manner within the jurisdiction of any department or agency of the United States or of any corporation in which the United States of America is a stockholder, shall be fined not more than $10,000 or imprisoned not more than ten years, or both."

The applicable portion of the statute involved is that section reading:

"or cause to be made any false * * * statements or representations * * * in any matter within the jurisdiction of any department or agency of the United States or of any corporation in which the United States is a stockholder * * *."

Brief Statement of the Case.

Ely A. Todorow and Leonard A. Potolski, two honorably discharged war veterans, stand convicted of "causing" a false statement to be made to the War Assets Administration, based solely upon the uncorroborated testimony of a self-confessed perjurer suffering from a "nervous disorder," to the effect that his previous statements under oath were false and that he was in this case telling the truth.

One of the fundamental questions thus presented by this petition is whether the rule which bars a conviction of perjury on the uncorroborated testimony of a single witness and proscribes a conviction of subornation of perjury by the unsupported testimony of the alleged subornee. applies equally in the case of a person charged with violation of Title 18, Section 80 (1946), of "causing a false statement to be made in a matter within the jurisdiction of a department or agency of the United States" where the alleged falsifier is the sole person to blame another for his own claimed falsity, for which he himself is not prosecuted.

The question is new and of fundamental importance, in view of the widespread prosecutions that have been undertaken under the statute, which was formerly the "false claim" statute and has now been amplified to cover any false statement in a matter within the jurisdiction of the United States, and the *quantum* of proof necessary in such a case, as a matter of law. Therefore, one of the important and fundamental questions that this Court must pass upon in its supervisory capacity of criminal law has arisen in this case and should be passed upon by this Honorable Court.

Also involved in this petition for a writ of certiorari is the question of whether in a case of "causing" another

allegedly to commit a crime, which involves either the independent act of the person committing the crime or his subordination to another who caused him to commit the crime, it requires the issues to be submitted to the jury, as to whether the alleged act done was the independent act of the doer of his own volition, or whether he was "caused" to do it by the defendants, under appropriate instructions on this subject.

The materiality of the alleged false statement is also in issue, where it was the result of changing day to day regulations and individual orders of a local administrator of the War Assets Administration and his day to day orders were neither published in the Federal Register or elsewhere for the guidance of any person who might be informed and know.

Also involved is the question of whether statements on a printed form of some extinguished agency constitutes a matter within the jurisdiction of the War Assets Administration.

Also presented herein is the question of whether the trial court erred in its instructions to the jury, where the indictment charged several alleged false statements in the count in question and it cannot be told on which one the jury might have reached its verdict. Thus the decisions below are in conflict with the applicable law of this Court on the subject.

The trial was conducted under an atmosphere of criticism by the trial court toward counsel for the defendants and the defendants. This deprived them of a fair trial guaranteed by the Fifth Amendment to the Constitution of the United States.

After having obtained a continuance through the Washington office of the Department of Justice, the defendants, upon appearing for trial (they being then out on bond),

were committed to the custody of the Marshal without bail and had to divide their time between fighting for their liberty pending trial, to which they were constitutionally entitled, and devoting some time to the preparation of their case and conference with local counsel who had just been obtained for them, in a strange city in which they had just arrived.

Caustic criticism of their counsel in the presence of the jury from time to time culminated in a critical instruction, which was not submitted to counsel prior to its being read to the jury, as required by the rules of procedure in criminal cases as promulgated by this Court.

On July 11, 1946, the War Assets Administration was conducting a sale of trucks and surplus supplies at Port Hueneme, California, open not only to veteran, but non-veteran, dealers, on a first come, first served basis [R. 114, 281].

The manner of sales varied from day to day, according to the idea of the local persons handling the sales, with no publication of any rules or regulations regarding the sale or the quantity which any person could secure. In fact, some of the rules were merely oral on the whim of the person in charge of the administration and some were written [R. 111].

Two war veterans with honorable discharges, Ely A. Todorow and Leonard A. Potolski, had appeared prior to that time and had each bought 25 trucks for resale [R. 119, 127]. (This was permitted, and authorized, although the printed form used by the government asserted it was not.) This was according to the oral views of one of the men in charge of the War Assets Administration to be the limit at that time, but by July 11, 1946, the sales were open to non-veteran dealers [R. 114] and there was

no preference in favor of veterans. The Government was anxious to sell its surplus to veterans as well as non-veterans.

Leonard Potolski had been with Patton's Third Army in Europe for four years and Ely Todorow had trained as a paratrooper, and they met in 1946, following their discharge [R. 265]. Potolski had become a dealer in automobiles after his discharge from the service on his return from Germany [R. 217]. Potolski met Todorow in Albany, New York, after serving in General Patton's Army [R. 265].

On July 11, 1946, Todorow and Potolski drove to Port Hueneme with another war veteran named Byron Taylor and another one named Gordon Lauridsen [R. 227]. When they arrived at Port Hueneme, Taylor went into a shack and there filled out a form on a blank of the *Smaller War Plants Corporation* (not the War Assets Administration), in which Taylor said he wanted six refueler trucks for the oil transporting business. This was apparently an old printed form. Taylor wrote out the Smaller War Plants form for a veteran's preference, although none was on that date necessary, in which he indicated he was going to pick out six refueler tanks from the War Assets Administration. The application was never used and the tanks were never purchased by Taylor or by the defendants from Taylor or anybody else, but all of the papers were torn up and destroyed when an investigator for the War Assets Administration called on the appellants later on and told them that Taylor's application was not permissible under the rules. Gordon Lauridsen, another veteran, who was in the psychopathic word of the Veterans' Hospital in West Los Angeles [R. 201], was also an applicant. Taylor had been dis-

charged from the military service "for a nervous condition" [R. 200] and had only served a short time prior to his discharge. On the way back from Port Hueneme an argument ensued between Taylor and Lauridsen and the two defendants over the transaction, and it was claimed the Lauridsen demanded $50.00 from appellants for his services in having gone down to Port Hueneme, while Taylor accepted $20.00, although he did not drive any trucks back. Lauridsen was dissatisfied.

Government witnesses testified that on July 11, 1946, the date when Taylor went to Port Hueneme, not only could a person who was or was not a veteran purchase any of the articles offered [R. 114] but a person who purchased trucks could resell them to anybody else [R. 124].

The appellants were charged in count 4 of the indictment (the count on which conviction resulted and from which the appeal was taken) with having caused one Byron N. Taylor, on or about July 11, 1946, to make false and fraudulent statements and representations in a matter within the jurisdiction of the *War Assets Administration* [R. 5]. The only representations that were made by Taylor were *not* contained on a form of the War Assets Administration, but on a form of the Smaller War Plants Corporation, in no way connected with the War Assets Administration, under the evidence in this case, at the time of the transaction. Nor was there any showing that there was any rule or regulation governing the sale which the appellants had violated, or in which they had knowingly or wilfully caused any false or fraudulent statements to be made.

Taylor's testimony was to the effect that he had gone to Port Hueneme in company with the two defendants and with one Lauridsen, and there he filled out an application

on the form as shown at pages 376-377 of the record. He filled out the application, saying on it that he was going into the business of transporting oil as soon as possible and other data on the form. Taylor testified that in filling out the application, when he came to the portion of the application relating to the business, he asked the defendant Todorow "what business he ought to put down," and that Todorow said that "there was no question as to what business I was going in" and that "anything would be sufficient" [R. 184]. Taylor then said that he filled out the application, though he had no intention of going into the oil transporting business [R. 185]. His testimony was that he was telling the truth in court, but that the statements he made on the form were untrue. The form contained several inconsistent matters, which apparently had been used by an agency which was then defunct, to-wit: the Smaller War Plants Corporation, and was on one of their forms, not on the form of the War Assets Administration. This application said that he was not procuring the property for purposes of resale, although the property was being sold generally to dealers and non-dealers for purposes of resale, and it was well known that that was the fact. The printed form also contained other language that the property was to be used in and as part of the enterprise described therein and was purchased for "his own personal use or for maintenance of my established business, profession or agricultural activity." Although statements were supposed to have been made before an officer certifying the same, there was no corroborating evidence that the defendants, or either of them, had caused the statements to be made, or that the statements were as a matter of fact wilfully false at the time they were made, or that they were not in fact material to getting any trucks or supplies.

Brief Statement of Procedural Errors in the Trial.

Before the trial started the appellants had obtained a continuance by going directly to the Department of Justice in Washington and having a request come from Theron L. Caudle of Washington to local counsel to grant the defendants a continuance [R. 89]. Apparently this procedure irked local counsel for the Government and the Court, from the remarks made herein, and when present counsel for the appellants appeared in the case and requested a short continuance on account of illness of one of the defendants the request was denied. From that point on the trial court's attitude toward the defendants as well as toward their counsel was very severe, indeed, as shown by the record, and his conduct was assigned as prejudicial misconduct from time to time. While one of the defendants flew from New York to be present at the time of the opening of the case, and was present when the trial opened, the other defendant was not present on account of illness, and when he appeared the Court committed both of the defendants into custody for the duration of the trial.

The issue of the fairness of the trial and the trial procedure under the Fifth Amendment to the Constitution of the United States are involved in this case.

The War Assets Administration at no time published any regulations of the changing character from day to day involved herein.

In the count of the indictment under discussion at least three statements and representations are charged to have

been caused to be made by the appellants. The Court instructed the jury contrary to the holdings of this Court in *Cramer v. U. S.*, 325 U. S. 1, footnote 45; *Stromberg v. California*, 283 U. S. 359, 368, and *Williams v. North Carolina*, 317 U. S. 287, 292, that it was not necessary for the jury to agree that the statements were false in all particulars charged, but that if one or more of the statements or representations charged in each count was false as charged, the Government would have sustained its burden. This instruction overlooked the fact that the jury may not have been unanimous on any one statement and that some jurors might have viewed one statement as being untrue and another viewed that another statement was untrue and none of them would have been unanimous.

The Court also permitted the Government to introduce alleged corroborative proof of the transaction, and that another man, named Lauridsen, then in an insane ward of the Veterans' Hospital, not named in the indictment, had been "caused" to make a similar statement. The Court also limited the cross-examination of the principal witness, an admitted perjurer, as to whether he knew he had committed a felony as going to his position as a principal, an accomplice in the transaction, for which the accomplice rule of evidence at least should have applied to him.

Questions Presented by This Petition.

I.

Whether the statement of an admitted perjurer, without corroboration, is sufficient to sustain a conviction, under the false claims statute, Title 18, Section 80 (1946 Edition), or whether the rule of two witnesses or one witness in corroborating circumstances is equally applicable in this case and under this statute regarding an alleged false statement as it is in the case of perjury, and subornation of perjury.

II.

Whether there can be a criminal violation predicated upon a day to day oral statement of changing local rules and regulations of an employee of the War Assets Administration, or whether this holding conflicts with the views of this Court in *M. Kraus & Bros. Co. v. U. S.*

III.

Whether an oral order or derivative, without any publication in the Federal Register or other announcement, if not observed, is sufficient to predicate a charge of making a "false statement" within the jurisdiction of an agency of the United States.

IV.

Whether a statement on a form of the defunct Smaller War Plants Corporation is a matter within the jurisdiction of the War Assets Administration.

V.

Whether the Court erred in instructing the jury where there are several statements made in a printed form which are not all false, and it cannot be told which statement

the jury agreed upon, if any, or whether some might have thought one statement was false and another thought another, but not have been unanimous on any one, whether it will sustain a conviction under a general verdict.

VI.

Whether it is prejudicial error to admit testimony of other alleged false statements or the causing of false statements to be made in proof of a charge of making a false statement under Title 18, Section 80, and whether reference to such a transaction is prejudicial error.

VII.

Whether the Court erred in giving an instruction to the jury without submitting it to counsel in accordance with Rule 30 of the Federal Rules of Criminal Procedure, requiring that the Court shall inform counsel of its proposed action upon request prior to their arguments to the jury, and failing to give counsel an opportunity outside the presence of the jury to object to an instruction which criticized defendants' counsel, which criticism was without foundation.

VIII.

Whether the evidence was insufficient to support the verdicts.

IX.

Whether the Court erred in permitting an alleged other "false statement," to-wit, the Lauridsèn transaction, to be offered in support of the Taylor transaction.

X.

Whether the good faith of the defendants was a defense to the charge of making a false statement, and whether evidence as to subsequent conduct with relation to W.A.A.

inspectors should have been the subject of an instruction to the jury as tendered but refused.

XI.

Whether the Court erroneously refused an instruction as to whether the defendants had caused an alleged false statement to be made or whether it was actually the independent act of the intermediary, and whether the refusal of such instruction constituted prejudicial error.

XII.

Whether there was a failure of proof to establish that a statement made on the form of the Smaller War Plants Corporation was as a matter of fact a matter within the jurisdiction of the War Assets Administration.

XIII.

Whether evidence of subsequent conduct by the defendants after July 11, 1946, was relevant to establishing their previous innocence and the Court's refusal to admit such testimony.

XIV.

Whether the cross-examination of Byron N. Taylor, the self-confessed perjurer, was so limited as to deprive the defendants of the right of proper cross-examination and fair trial, and to establish Taylor as an accomplice as a matter of law.

XV.

Whether the trial court erred in permitting over objection cross-examination of the defendant Todorow.

XVI.

Whether the trial court was guilty of prejudicial misconduct which deprived the defendants of a fair trial.

XVII.

Whether the trial court erred in denying the defendants a bill of particulars.

XVIII.

Whether the indictment stated an offense against the laws of the United States.

XIX.

Whether a District Judge, unconfirmed by the Senate, may sit as a Judge *pro tempore* in the Circuit Court and constitutionally pass upon the conduct of another District Judge on appeal.

Reasons for Granting the Writ.

This case involves settling principles which are highly important to the public in the administration of criminal justice. This is particularly true since the "false claim" statute has been amplified to include any alleged false statement in a matter within the jurisdiction of the Government. Its present widespread use (*Marzani v. U. S.*, No. 59, October Term, 1948) should be defined and limited by appropriate rules governing the evidence in such cases which are similar to cases, such as perjury and subornation of perjury.

This case also presents an important question of supervisory control by this Court in the administration of criminal justice.

A hearing should also be granted because the ruling of the District Court was affirmed in an opinion written by a District Judge sitting *pro tem* in the Court of Appeals, and approves of practices violating fundamental constitutional rights of the accused against being incarcerated

pending trial and the effect of that incarceration upon their part fairly to prepare their case for trial.

The case also presents questions of conflict in opinion between the District Courts and Courts of Appeal and this Court's decision as to the applicable law and the appropriate instructions in a case where it cannot be told on which alleged statement the jury might have agreed, or whether they did agree unanimously on any one alleged false statement, and is in conflict with this Court's holding in *Cramer v. U. S.*, 325 U. S. 1; *Haupt v. U. S.*, 330 U. S. 631; *Williams v. North Carolina*, 317 U. S. 287, and *Stromberg v. California*, 283 U. S. 359.

A hearing should also be granted to decide whether the decision of the District Court and the Court of Appeals is in conflict with the opinion of this Court in *M. Kraus & Bros. v. U. S.*, 327 U. S. 614, 90 L. Ed. 894, where the transaction is based upon the materiality of a statement involving the War Assets Administration and the rule or regulation upon which the statement, if made, would be material, based upon a rule or fluctuating day to day regulation neither published in the Federal Register nor promulgated anywhere else.

The question involved also is whether the Court may submit an instruction to the jury criticizing defense counsel without submitting it to counsel prior to the case being submitted to the jury, as required by the Rules of Procedure for the District Courts of the United States and without giving counsel an opportunity to discuss same and object to the instruction prior to its having been read

to the jury, and whether in this case, like in the case of *Nye & Nissen and Mancharsh v. U. S.*, No. 228, October Term, 1948 (to review the decision of the Court of Appeals in 168 F. 2d 846), evidence of other similar offenses was improperly presented for consideration by the jury for the purpose of determining intent.

The case also involves questions of fundamental criminal law and procedure which have been decided contrary to the views of this Court.

It also involves a question never determined, namely, whether a District Judge may constitutionally sit in the Circuit Court of Appeals to review the acts and alleged misconduct of another District Judge of his circuit.

We respectfully pray that a writ of certiorari be granted and the judgments of the Court below reversed.

Respectfully submitted,

MORRIS LAVINE,
Attorney for Petitioners.

IN THE

Supreme Court of the United States

October Term, 1948.

No. .....

ELY A. TODOROW and LEONARD A. POTOLSKI,

Petitioners,

vs.

UNITED STATES OF AMERICA,

Respondent.

BRIEF IN SUPPORT OF PETITION.

Petitioners incorporate by reference herein the jurisdictional statement, statutes involved, and brief statement of the case, as set out in the petition.

The opinion below has not as yet been reported, but is set out in the record at pages 396-415.

This Court should grant certiorari because of the fundamental questions of importance that should be determined by this Court in its supervisory capacity in criminal matters and because of conflicts of the court below with decisions of this Court, and because the defendants were denied a fair trial guaranteed by the Fifth Amendment to the Constitution of the United States.

I.

The Court of Appeals Erred in Its Opinion in Holding That the Testimony of a Single Neurotic Perjurer, Unsupported or Uncorroborated, Is Sufficient Proof to Establish the Making of a False Statement, and in Holding That the Rule Applying in Perjury Cases and in Subornation of Perjury Cases Does Not Apply.

It is highly important that a hearing be granted by this Court to determine this very important issue in view of the widespread present use of the "false claim" statute, which has effectually eliminated the two-witness rule in all matters where the alleged perjury involves governmental matters, or matters in any governmental agency, department or corporation.

In *Weiler v. U. S.*, 323 U. S. 606, it is held that it is the untrustworthiness of this character of testimony which is one of the main reasons for the rule requiring two witnesses.

In *Hammer v. U. S.*, 271 U. S. 626, this Court held that subornation of perjury committed in bankruptcy proceedings requires the same rule as in perjury prosecutions. As stated in *Hammer v. U. S.*:

> "Here the sole reliance of the government is the unsupported testimony of one for whose character it cannot vouch—a dishonest man guilty of perjury on one occasion or the other. There is no reason why the testimony of such a one should be permitted to have greater weight than that of a witness not so discredited.

* * * * * * * *

* * * The rule that the uncorroborated testimony of one witness is not enough to establish falsity applies in subornation as well as in perjury cases. * * * Falsity is as essential in one as in the other. It is the *corpus delicti* in both."

In the case here of "causing" a false statement to be made, the witness was by his own confession a dishonest man. Falsity was the essence of the charge and should not have been permitted to rest upon his statement alone, and the rule should be established in false claim statutes to that effect.

The same serious rule of evidence should apply in these matters as in perjury cases.

Convictions should not be made easier when we are dealing with perjurors, whether in a matter before a government agency or court.

The testimony in this case showed that Taylor was a neurotic war veteran [R. 200, 201]. "It was a release for a nervous condition" [R. 200]. He got a medical discharge. His fellow partner Lauridsen was in a mental hospital at Sawtelle Veterans Hospital [R. 201]. He told the Court he was a liar. He told the Court he had lied in his application to the War Assets Administration. He told the Court in the present case that he lied before and that now he was telling the truth. But, what substantially was there to establish that he was telling any more the truth now than he was when he falsified before the War

Assets Administration? In any event he was an admitted perjurer. He sought, however, to blame somebody else for his falsification.

Under those circumstances, the rule in perjury should apply because it was his oath against the oath of each of the appellants that his statements were false and that they had caused him to make the statements that were in question. Can the statements of such a witness be considered substantial?

As said in *Sykes v. United States,* 204 Fed. 909, at page 912:

> "And the conclusion is that the uncorroborated testimony of the confessed perpetrator of a crime, contradicted under oath by herself, contradicted by other witnesses, and inspired by the hope of immunity from punishment, which in this case has since turned to glad fruition, that another was an instigator or a participator in the perpetration of her crime, is not only insufficient to establish his guilt beyond a reasonable doubt, but that it presents no substantial evidence of it. Jahnke v. State, 68 Neb. 154, 104 N. W. 154, 158."

The case is very similar to *Dahly v. United States,* 50 F. 2d 37, 44. There, as here, the mental condition of the witness "was shown by the evidence to be open to serious question." Taylor's testimony was denied by the appellants and the only other witness to the conversation was

an insane person. Thus it is said in *Dahly v. United States:*

> "Without trenching upon the general rule that appellate courts will not usually weigh the evidence, yet on account of the foregoing considerations, and in view of the exceptional facts in the case, we are of the opinion that the testimony of Smith relative to the particular matters mentioned cannot be held to be substantial in any true sense of that word. 17 C. J. §§3594-3496; Sykes v. United States, 204 F 909 (C. C. A. 8); United States v. Murphy, (D. C.), 253 F. 404; Jahnke v. State, 68 Neb. 154, 94 N. W. 158, 104 N. W. 154; Green v. State, 6 Okl. Cr. 585, 120 P. 667; Stanford v. State, 16 Okl. Cr. 107, 180 P. 712; see, also Mickle v. United States, 157 F. 229 (C. C. A. 8); State v. Moe, 68 Mont. 552, 219 P. 830; State v. Wilson, 76 Mont. 384, 247 P. 158; Cooper v. State, 130 Miss. 288, 94 So. 161."

Therefore, there is every reason for the "two witness rule" to apply in this case, and, in any event, where the testimony is unsubstantial it should not form the basis of sustaining a conviction which will wreck two other veterans in their future whole lives, sentencing them to the penitentiary for a period of two years, fining them $3000.00 each, and taking away all their military credits —on such unsubstantial testimony.

II.

The Writ Should Be Granted by This Honorable Court in Its Supervisory Capacity Over Criminal Matters.

The court below, in an opinion written by a District Judge, held in conflict with the opinion of this Honorable Court in *M. Kraus & Bros.*, 327 U. S. 614, that it was immaterial that there was no rule, regulation or order existing on July 11, 1946, regarding which appellants made or could have made any false or fraudulent statements in a matter within the jurisdiction of the War Assets Administration, or by which they caused Byron N. Taylor to make such a false and fraudulent statement or representation.

The effect of this holding is to permit a criminal prosecution of a person on the mere oral order, rule or regulation of an administrator and to permit him to shift his order from day to day and to permit the determination of whether there was or was not an order, rule or regulation covering the specified matter to rest within the bosom of a single administrator. Such a holding is contrary to our fundamental principles of government and is very similar to that of dictatorship.

The local manager of the War Assets Administration, trying to sell surplus property, shifted his orders from date to date as to who could buy and the quantity that could be bought, but such orders were not published in any Federal registry, or in any regulations or orders.

To have made a false statement in a matter within the jurisdiction of the Government required the existence of some order, rule or regulation which would have been officially promulgated, and made known, and which was the basis of the statement allegedly false.

III.

This Court Should Exercise Its Supervisory Control That a Prosecution Should Not Be Founded on Shifting Day to Day Orders of an Individual Administration.

THE EVIDENCE WAS INSUFFICIENT TO SUPPORT THE VERDICTS. THE VERDICTS ARE CONTRARY TO THE LAW AND THE EVIDENCE.

The evidence is insufficient in this, that:

A.

(1) There was no evidence of any rule, regulation or order existing on July 11, 1946, regarding which appellants made any false or fraudulent statements in a matter within the jurisdiction of the War Assets Administration, or by which they caused Byron N. Taylor to make such a false and fraudulent statement or representation.

Without proof of any regulation, rule or order, the statements which are claimed to have been caused to be made become immaterial.

(2) No prosecution can be founded on a matter within the jurisdiction of an agency of the United States unless that matter is shown actually to exist by a lawful rule, regulation or order, properly promulgated, and of which the accused has notice and an opportunity to learn thereof.

Even if a rule or regulation is charged, governing a department or agency of the United States, on which a criminal prosecution is later sought to be founded, it must be so definite and certain that any person of common understanding may know what is intended.

M. Kraus Bros. Co. v. U. S., 327 U. S. 614, 90 L. Ed. 894.

In this case the prosecution claimed (but did not prove) that there were certain rules or regulations which governed the sale of surplus property at Port Hueneme, California, and that the appellants caused Byron N. Taylor to make statements in a veterans' application for surplus property and a purchase-requisition form, on or about July 11, 1946, at Port Hueneme, in connection with the purchase of six tank refueler trucks [R. 5-6]. (No purchases were ever made.)

The Government did not introduce any rule or regulation covering the sale of these trucks, but put on Curtis Alexander, manager of the automotive and construction equipment sales at Port Hueneme [R. 108].[1]

There were various changes made in the orders from time to time [R. 112-114]. Then the witness testified that on July 2nd, any licensed automotive dealer could

---

[1]Mr. Alexander testified as follows:

"Q. (By Mr. Harrington): Now referring to your testimony, you testified that that sale commenced May 20, 1946, is that correct? A. Yes.

Q. During the first period of the sale were there restrictions with respect to the sale of the trucks? To put it another way, were there certain people who could get the trucks and other people who could not? A. The trucks were offered for sale to veterans of World War II only.

Q. Commencing May 20, 1946? A. Commencing on May 20th.

Q. And subsequently were there changes in your orders with respect to whom you could sell the trucks to? A. Yes; there were changes later.

Q. Would you relate what changes occurred between that period and say, July 15, 1946?

Mr. Lavine: Now, just a minute. I object to that as not the best evidence, irrelevant, incompetent and immaterial, not binding on these defendants.

The Court: Were these rules in writing?

buy without any preferential basis [R. 114]. The witness testified as follows:

"The Court: Would a veteran, commencing July 2nd, have any priority over an automotive dealer?

The Witness: No, your Honor. He would be just on a first served basis. The federal government could purchase on that date, too, but no one had any priority over anyone else.

The Court: Commencing July 2nd, 1946?

The Witness: Yes, Your Honor." [R. 114.]

While the witness referred to "existing directives" no directives or orders or regulations were introduced in evidence. Hence, on July 11th, when the alleged occurrence took place (which was never completed, as no use was made of the claimed documents) according

---

The Witness: Changes, you mean, Your Honor?

The Court: Yes.

The Witness: Yes; the changes were made in writing.

The Court: Any written instructions?

The Witness: In advertising.

The Court: Did you have any writing?

The Witness: Yes.

Mr. Harrington: Maybe I can clarify the point, Your Honor, by a couple of other questions. Withdraw that question.

Q. Mr. Alexander, as head of that section at Port Hueneme, who did you work under? A. Under the Los Angeles regional office. My immediate superior is Mr. Fry who is chief of the automotive and construction division equipment for this region.

Q. Were there occasions during the course of this sale that you received orders from Mr. Fry to make changes in the people and classes of people that you could sell them to? A. Yes; there were.

Q. Were there instances that you received oral orders and other instances in which you received written orders? A. That is correct." [R. 110-111.]

to the witness, sales of trucks were open to any licensed automotive dealer, whether they were veterans or non-veterans.

The objective of having a veteran's preference did not exist as of that date.

It is respectfully submitted that, without specific proof of a regulation, order or directive, the evidence is insufficient to establish a basis for a false claim or false statement in a matter within the jurisdiction of the Government.

It would then be immaterial, and, we submit, that the rule applicable in perjury cases should apply.

Kuskulis v. U. S., 37 F. 2d 241.

The only way of determining whether such a statement was or could be false would necessarily have to be based upon causing someone to make a statement, which was material and germane to the particular issues and which was necessarily contrary to a ruling or regulation.

B.

The prosecution's case is founded on a contention that there was a *preference* to veterans on *July 11, 1946,* in the purchase of trucks, and that the appellants caused Byron N. Taylor to make a statement in an application, which was contrary to the rule, regulation or directive. However, the Government failed to produce any such rule, regulation or directive and, therefore, the statements which Byron Taylor made in his application were immaterial.

There is another reason why they were immaterial, and that is that on July 11, 1946, according to the Government's own witness, there was no longer any prefer-

ence as between veterans and non-veterans, but non-veteran dealers could purchase the trucks the same as anybody else. It was not shown that there was any necessity for any veteran to make any application, or that such application put him in any different category or position than any non-veterans, or that there was any rule, regulation or directive which governed veterans and non-veterans.

In *M. Kraus Bros. Co. v. U. S.*, 327 U. S. 614, 90 L. Ed. 894, the Supreme Court of the United States held that before one can be prosecuted for violating a rule or regulation, the rule or regulation must be explicit and unambiguous, and must adequately inform those who are subject to their terms what conduct will be considered evasive so as to bring criminal penalties into operation. The dividing line between unlawful conduct and lawful action cannot be left to conjecture.

In that case the regulation was published and made known in the Federal Register. The Court said:

> "* * * The prohibited conduct must, for criminal purposes, be set forth with clarity in the regulations and orders which he is authorized by Congress to promulgate under the Act. Congress has warned the public to look to that source alone to discover what conduct is evasive and hence likely to create criminal liability. United States v. Resnick, 299 U. S. 207, 81 L. Ed. 127."

In the present case the regulation or directive which it is claimed provided the basis for governing the conduct

of the applicant was never presented to the court or jury and, therefore, the entire basis for the prosecution as to whether any false statement was made was left to conjecture.

The sale at Port Hueneme was governed apparently solely by local procedure. It was a sale which had been arranged by the local officer and he changed his instructions from day to day, according to his own ideas and determinations. He stated that there were directives, but none were introduced or presented in the case. Surely, a prosecution cannot be based upon a change from day to day of rules, regulations or directives, and upon an application which it was never shown was necessary or required to be made at the time of the sale involved, and which was, therefore, entirely immaterial.

No rule, regulation or directive was either introduced in evidence or read to the jury.

Corson v. U. S. (9th Cir., 1944), 147 F. 2d 437-438;

Bailey v. U. S. (9th Cir.), 13 F. 8d 325, 327;

Williams v. U. S., 66 F. 2d 868;

U. S. v. Noble, 155 F. 2d 315;

Bird v. U. S., 180 U. S. 356, 361, 45 L. Ed. 570;

Capital Traction Co. v. Huff, 174 U. S. 1, 13, 16, 43 L. Ed. 873;

Patton v. U. S., 281 U. S. 276, 288.

While in these cases there was a failure to give a full instruction to the jury on the law, in the present case there was nothing presented either in the evidence or in

the instructions to the jury by which the jury could know that there was any rule, regulation or directive which required a statement of the character made by Byron N. Taylor and, therefore, there could be no basis that it was false or fraudulent, or material.

In his opening statement to the jury, Mr. Harrington, counsel for the Government, outlined his position as follows:

> "The Government expects to prove as to the War Assets Administration, that one of the fundamental objectives of their work under the rules and regulations under which they operate was to give veterans a preference." [R. 74.]

The Government, however, failed to prove any rule or regulation which operated to give veterans a preference on July 11, 1946, the date when the transaction took place. On the contrary their own witness stated that there was no preference on July 11, 1946 [R. 114].

Curtis Alexander testified that, commencing July 2, 1946, the sale was open to non-veterans as well as veterans, and there was no prohibition against dealers reselling to anyone else, and anyone could buy on July 11, 1946, from dealers—dealers who were non-veterans could buy up to 25 units of tank refueler trucks, and could resell them at a profit [R. 124] and later on surplus trucks and material that had not been sold were offered at a lesser price to dealers [R. 128]. A large number of the trucks were sold to non-veteran dealers in July and August [R. 129].

IV.

The Court Should Grant a Hearing in Its Supervisory Capacity Over Criminal Matters Also Because of the Prejudicial Misconduct Toward the Defendants in the Case, Which Deprived Them of a Fair Trial Guaranteed by the Fifth Amendment to the Constitution of the United States and the Effective Aid of Counsel in the Trial of Their Cause.

From the very start of the case the trial judge was "touchy" toward the defendants and their counsel.

When the case was first called, present defense counsel appeared in Court and asked for a delay of only two days, as one of the defendants was ill in New York and weather and flying conditions were then bad. Present counsel told the Court that he was not familiar with the facts of the case, he was just getting into the case, and requested only two days' time [R. 48-49]. This was resisted by the Government in a lengthy argument [R. 52 *et seq.*], the Court finally stating to present counsel: "You did not make the arrangement, so we won't permit you to alter the arrangement. They can answer for themselves on this situation" [R. 54].

The Court declined a continuance and ordered the case to trial the next morning. Defendant Ely Todorow flew from New York and was in court the next morning when the case was called. Present counsel presented a doctor's affidavit as to defendant Potolski being under the doctor's care and that he should continue treatments for a further short period [R. 56]. The Court ordered the case to proceed to trial. At the suggestion of the Government that they did not like to split up the case, the Court continued the case for two days on the assurance of defense counsel that he would have the defendant Potolski in

Court even though he was a veteran under the doctor's care [R. 65].

The Court stated that if he was not present within the two day period his bail would be forfeited, and defense counsel assured the Court that he would do everything possible to be ready and that he would work day and night to be ready [R. 66]. This he did on the reliance that the defendants were out on bail and he would have ample opportunity to confer with them and to have their assistance in locating witnesses and in getting information.

After the trial started the Court then took time out to question the defendants about "their failure to be present here Tuesday" [R. 82]. Although defendant Todorow was present on Tuesday (having flown all night to respond to the Court's order), the Court nevertheless insisted on addressing both defendants. They described their airplane flight [R. 82-83]; but in spite of that fact and the doctor's affidavit as to the defendant Potolski, the Court without any authority at law ordered them "into custody of the Marshal for the duration of the trial" [R. 85].

Thereafter defense counsel told the Court that he had raised the question as to "whether your Honor would feel prejudiced in any way against these defendants by reason of the things that they were not responsible for, but their attorneys in New York" were responsible for [R. 86]. The Court denied that he was prejudiced against the defendants, although he had just committed them to jail. Defense counsel then told the Court that he had not given the defendants a chance to show that they personally had no responsibility for what happened and that committing defendants to jail would deprive counsel in this case of all that has to be done to adequately prepare these men

in their defense [R. 87] and that the Court was depriving the defendants of a fair trial. The Government went into a lengthy explanation of what happened, and apparently what was irking Government's counsel was that the original continuance had been arranged in Washington and not in Los Angeles. It was shown that the defendant, Potolski, who had served with Patton all over Europe, was in ill health and was being given a course of treatments [R. 94] which had not been completed. The defendants themselves did not know anything about what was going on except that Potolski was told that he could stay to take his medical treatment and get his medical care before the trial [R. 97].

The Court nevertheless kept the defendants committed for several days, and defense counsel was required to file a writ of habeas corpus and present arguments and take up considerable time which ordinarily was needed for the preparation of the case for trial, which had commenced on such short notice in so far as defense counsel was concerned.

Throughout the trial the trial judge kept pushing the trial, holding sessions, including Saturday, and the trial judge kept "needling" defense counsel in the presence of the jury, although he asserted that he had no prejudice against defense counsel because of what had happened.

Again, the Court later on said, as counsel started to question the witness about his direct examination:

> "Q. By Mr. Lavine: You testified on direct examination—
>
> The Court: Now, none of that, Mr. Lavine. Just ask him questions. * * *" [R. 126.]

In connection with the custody of the defendants, a little later on the Court said:

"The Court: In other words, your theory is that the court might lock up the jury, but is not privileged to lock up the defendants during the trial?

Mr. Lavine: Not my theory. It is the law, and I expect to show your Honor the rule and the statute that cover the subject. And that happens all the time, your Honor; jurors are locked up but defendants are not.

The Court: It is discretionary with the Court, isn't it?

* * * * * * * *

Mr. Lavine: No, sir; it is not, your Honor." [R. 130.]

Again, on cross-examination of the Government's principal witness:

"Q. You know now that you did commit a felony at that time?

Mr. Harrington: I object to that, Your Honor. There is no evidence of that.

The Court: You do not need to answer that. Put another question.

* * * * * * * *

The Court: You know better than to ask a question like that of the witness." [R. 204.]

As stated in *Quercia v. U. S.*, 289 U. S. 466, 469:

"This privilege of the judge to comment on the facts has its inherent limitations. His discretion is not arbitrary and uncontrolled, but judicial, to be exercised in conformity with the standards governing

> the judicial office. * * * The influence of the trial judge on the jury 'is necessarily and properly of great weight' and 'his lightest word or intimation is received with deference, and may prove controlling.' * * * He may not charge the jury 'upon a supposed or conjectural state of facts, of which no evidence has been offered.' United States v. Breitling, 20 How. 252, 254, 255, 15 L. ed. 900, 902. It is important that hostile comment of the judge should not render vain the privilege of the accused to testify in his own behalf."

At the time of sentence Government counsel recommended fines and a jail sentence [R. 40]. The Court promptly ignored the recommendation of the Government and sentenced the defendants to the penitentiary and declined to fix bail pending appeal [R. 40].

Later, on application, the Court of Appeals fixed bail pending appeal [R. 363].

One of the essentials of due process of law guaranteed by the Fifth Amendment to the Constitution of the United States is a fair trial. (*Duncan v. Kahanamoku,* 327 U. S. 304.) One of the essentials of fair trial is not only that a defendant have counsel, but that he have ample time to prepare his defense, and the uninterrupted service of counsel by a division of his work.

Glasser v. U. S., 315 U. S. 60;

Powell v. Alabama, 287 U. S. 45, 77 L. Ed. 158;

People v. Simpson, 31 Cal. App. 2d 267.

Another essential is that one not only have counsel, but have the effective aid of counsel that nothing be done in the preparation of the trial of the case to impede counsel.

It was, therefore, highly prejudicial for the Court to commit the defendants to the custody of the marshal and sheriff and keep them in jail during the course of the trial when their time was necessary for proper preparation of the case, and likewise it deprived their counsel of full and adequate opportunity to prepare the case for proper presentation to the jury.

This Court in its supervisory capacity should grant certiorari to determine these issues.

Such procedure denied these defendants fair trial guaranteed by the due process clause of the Fifth Amendment to the Constitution of the United States.

It would be meaningless to give one counsel of his choice and then make it impossible for the counsel to give full and effective aid, by reason of extraneous matters of the court's own conduct.

Glasser v. U. S., 315 U. S. 60.

The District Court and the Court of Appeals rendered a decision in conflict with the opinions of this Court on the matter of the conduct of the jury in determining the questions involved.

V.

The Court Erred in Instructions Given and Refused.

The Court erred in giving the following instructions to the jury, which were vigorously objected to:

> "In each of the four counts of the indictment it is charged that certain statements and representations contained in the 'Veterans' Applications for Surplus Property' and the 'Purchase-Requisition Forms' were false and fraudulent in several particulars. **It is not necessary for the Government to prove that such statements and representations were false in all the particulars charged, or that the defendants caused every such statement and representation to be made as charged.** If you are convinced beyond a reasonable doubt that from the evidence as to each count **that one or more of the statements of representations charged in each count was false as charged,** and that the defendants knowingly and wilfully caused such false statement or representation to be made to the War Assets Administration, then knowing it to be false, the Government's burden of proof in this regard has been sustained." [R. 345-346.]

This instruction was objected to during the period prior to the jury retiring and renewed again after the Court had given the instruction. This instruction was erroneous.

Cramer v. U. S., 325 U. S. (Footnote 45);

Stromberg v. California, 283 U. S. 359, 368, 75 L. Ed. 117, 1122;

Williams v. North Carolina, 317 U. S. 287, 292, 87 L. Ed. 279, 282.

The Court erred in connection with the instructions given and particularly with reference to an instruction that it was only necessary for the Government to prove one alleged misstatement, although several were charged in the count in the indictment.

Where an offense of making a false statement is charged, *in solido*, it is incumbent upon the Government to prove the charge in its entirety and part of it cannot be separated from the rest.

> *Welsh v. State*, 88 Tex. Criminal 346, 227 S. W. 301.

There is a general principle of law also on which this necessarily rests, that in a situation such as this the verdict might not be unanimous, because four jurors might have believed that a defendant caused one statement to be made, four jurors might have believed that a defendant caused another statement to be made, but none of the jurors agreeing that a defendant caused the particular statement to be made upon which guilt might rest.

> *People v. Meraviglia*, 73 Cal. App. 402.

The Court of Appeals says that "The instruction correctly states the law," citing cases which ante-date the decisions of the Supreme Court of the United States in the cases of *Haupt v. United States*, 330 U. S. 661, and *Cramer v. United States*, 325 U. S. 1. In each of those cases the Supreme Court of the United States, in effect, held that there had to be unanimity by the jury on the overt

act. This instruction deprived the jury of that unanimity. If there is more than one alleged false statement, six jurors might believe one and six others might believe the other, but never agree on the particular statement allegedly false. Hence the instruction is faulty.

We respectfully submit that it was not contended by the Government, in the case, that all of the statements that Taylor made were false. It was conceded in the oral argument that some of the statements allegedly false on certain applications were in fact not false and the court, in giving this instruction to the jury, was apparently mindful of that situation. Therefore, the procedure should have been for the Government to have withdrawn all statements or matters which it was conceded were indisputably true, or on which there was no substantial evidence, and submitted to the jury only the particular statement allegedly false. The case had to rest, like perjury cases, on all of the statements being false or none of them being false. However, they did not do so and, for that reason, we respectfully submit that the instruction was erroneous and that this court erred in holding that it was correct and this court should grant a rehearing thereon.

VI.

The Court of Appeals Erred in Its Holding That the Matter Was Within the Jurisdiction of the WAA as to the Sufficiency of the Evidence.

In its opinion, the Honorable United States Court of Appeals for the Ninth Circuit stated that the defendants were charged in Count Four with wilfully causing Byron N. Taylor to make false and fraudulent statements in a matter within the War Assets Administration, to-wit:

> "In a Veteran's Application for Surplus Property and a Purchase Requisition form filled out by Taylor."

The opinion nowhere refers to the fact that the exhibits show that the applications were not made out on a form of the War Assets Administration, but on a form of the *Smaller War Plants Corporation* [R. 376], and there is no testimony that this form was a form that was a form of the War Assets Administration or that was within the jurisdiction of the War Assets Administration.

The form reads as follows:

NFIDENTIAL—For Use of Federal Agencies Only.	Form Approved Budget Bureau No. 12-R2568
MPC-66 45)	DO NOT FILL IN THIS SPA(
United States of America Smaller War Plants Corporation	Case No. V33D34004
AN'S APPLICATION FOR SURPLUS PROPERTY (Under SPB Reg. 7)	Date Jul 11 1946
PORTANT—See Instructions on Separate Sheet	P.H.

The Smaller War Plants Corporation was dissolved by an Act of Congress, December 27, 1945.

10 F. R. 15365.

No explanation is made as to the jurisdiction or power of the War Assets Administration, nor is there any showing that the alleged statements contained in the application were on an application of the War Assets Administration.

The document must, of necessity, speak for itself as a document of the Smaller War Plants Corporation and a form for Veterans' Application for Surplus Property of the Smaller War Plants Corporation, not an application of the War Assets Administration. We fail to see, therefore, how such a document or statement appearing in such a document is "a matter within the jurisdiction of the War Assets Administration." Very evidently, the court, in its decision, overlooked this important document, which is the basis of the entire prosecution for there is nowhere any mention of it in the entire opinion of the court.

See *Defense Supplies Corporation v. Lawrence Warehouse, et al.,* for the effect of dissolution of the Defense Supplies Corporation, 164 F. 2d 773.

The Court, further in its opinion, erred in the factual statement that "Taylor had no intention of going into the oil transport business." Whether Taylor did or did not intend to go into the oil transporting business rested on his own contradictory statements in the application which he made and the statement which he made in the court room contradicting what he said under penalty of making a false statement to the government in his writing on the Smaller War Plants Corporation form. The court incor-

rectly assumed that he was telling the truth in the court and not when he made his statement when he was making it on the form in question.

There is no more reason to give full credit to his statement in court than there was to give full credit to his other statement, which certified as follows, in question 18:

> "I hereby certify that all of the foregoing statements are true to the best of my knowledge and belief," etc.

and further,

> "that I am, or will be, directly or indirectly, the sole proprietor of the enterprise described herein, or that no person or persons, other than veterans, have or will have any proprietary interest in the enterprise, singly or together, directly or indirectly, in excess of 50 per cent of either the capital invested in the enterprise or of the gross profits or income thereof; that the capital invested in the enterprise does not, or will not, exceed $25,000 if an agricultural enterprise, or $50,000 if a business enterprise," etc. [R. 377.]

The evidence indisputably shows that Taylor, if not directly, was indirectly to be interested in the enterprise and that no person or persons other than veterans have, or will have, any proprietary interest in the enterprise.

The purpose of the statute and regulation, so far as the War Assets Administration was concerned, was not to deny veterans—both appellants being veterans with honorable discharges and excellent records—of the right to help other veterans in this, to the extent of paying him but of giving him an opportunity to make money in a "small business enterprise." The appellants herein could very well have, on July 11, 1946, bought all the govern-

ment automobiles they wanted from "licensed automobile dealers who were not veterans but who could come to the war assets administration and buy on a first come, first serve basis without priority at all." How, then, was any statement made by a veteran to get automobiles for resale to other veterans, or to be associated with other veterans who were financing them, we respectfully submit, stretching the statute and the applicable regulation beyond their clear intent. It was for this reason that we contended from the start that the indictment did not state a public offense and, furthermore, that we contended that the evidence was entirely insufficient to justify the verdict.

On July 11, 1946, it was uncontradicted in the record that the sales were open to veterans and non-veterans on a first come, first serve basis. There were no restrictions except as to numbers of items and there was no restriction against a veteran buying his quota and turning it over to some other veteran who may have received his quota, or being in partnership with the veteran who may have already received his quota.

There is nothing in the record to show that a purchaser of six refueling trucks on July 11th, 1946 would be required to follow a procedure or use a form which was being used at some prior date or in some prior proceedings.

In view of the language of the application, as well as the language of the statutes, it cannot be assumed without testimony that "they knew that he was not a dealer and it is only claimed as priority as a veteran," nor is there any substantial proof that they induced him to make the application for the purchase of the trucks for their benefit and not for his own use, or that he was obliged to make the alleged representations.

Each of the other questions presented raise important questions of criminal law and procedure.

The trial and District Court erred in admitting an alleged similar transaction for proof of another transaction where it was claimed that a false statement was caused to be made in proof of another false statement easily made. This has never been permissible and this court should exercise its supervisory powers in criminal matters to hear and determine this matter.

Over objections of the defendants, the court admitted testimony and conversation with a man named Gordon Lauridsen, who was, at the time of trial, in an insane hospital for veterans. The court told the jury,

> "If you find from the evidence that the transactions alleged in the indictment, or any of them, took place then you may consider the evidence of a transaction involving Lauridsen for the purpose of determining the intent to which the defendants acted in doing the acts charged in any count in the indictment, if you find from the evidence that they did those acts, but you may consider it for no other purpose." [R. 160; see also R. 165.]

The court thus admitted the testimony regarding Lauridsen, who was not and could not be produced, over defendant's objections, to determine "state of mind of the defendants" which was highly prejudicial error and similar to the transaction involved in this court's consideration of the *Nye* and *Nissen* case.

This court should also consider the cause on the basis of matters being considered in the case of Harold R. Christoffel, a union labor leader granted a review of his conviction on perjury, on the basis of Christoffel's view

that the committee was improperly organized. Our basis of review is that there are no applicable regulations that could be material to any alleged false statement.

Particularly the right of a district judge to pass on the alleged misconduct of another district judge of his own circuit was never intended by Congress in permitting a district judge to sit *pro tem* in the Circuit Court of Appeals, nor is such a judge constitutionally authorized to do so, since circuit judges must be appointed as such by the president and approved by the Senate. Their appointment and assignment to a particular case by the senior circuit judge is not constitutionally permitted nor otherwise authorized by law.

For each of the grounds set out in our petition as to the questions presented, and the grounds here argued, we urge this court to grant certiorari and reverse the judgments below.

Respectfully submitted,

MORRIS LAVINE,

Attorney for Petitioners.

INDEX

CITATIONS

Cases:

Statutes involved:

Miscellaneous:

In the Supreme Court of the United States

OCTOBER TERM, 1948

No. 727

ELY A. TODOROW AND LEONARD A. POTOLSKI,
PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the Court of Appeals (R. 396-415) is reported at 173 F. 2d 439.

JURISDICTION

The judgment of the Court of Appeals was entered February 15, 1949 (R. 416), and a petition for rehearing was denied March 18, 1949 (R. 417). The petition for a writ of certiorari was filed April 15, 1949. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1). See also Rules 37(b)(2) and 45(a), F. R. Crim. P.

QUESTIONS PRESENTED

1. Whether false statements in an application for surplus government property were made in a matter within the jurisdiction of the government agency selling the property, and were materially false and fraudulent.

2. Whether petitioners' convictions for causing false statements to be made in a matter within the jurisdiction of a government agency were supported by substantial evidence although they rested in large part upon the testimony of the accomplice who made the false statements on their behalf.

3. Whether the jury was properly instructed that a conviction could be based upon proof of any one of the several false statements charged in the indictment.

4. Whether evidence of petitioners' participation in a collateral offense, similar in type and closely related, was admissible to show their intent in respect of the offense charged in the indictment.

5. Whether the conduct of the trial was fair, and whether petitioners were prejudicially denied bail during a part of their trial.

STATUTE INVOLVED

Section 35(A) of the Criminal Code (18 U.S.C. [1946 ed.] 80) provided in pertinent part:[1]

> * * * whoever shall knowingly and willfully falsify or conceal or cover up by any

[1] This provision is now found in Section 1001 of Title 18, U.S.C.

trick, scheme, or device a material fact, or make or cause to be made any false or fraudulent statements or representations, or make or use or cause to be made or used any false bill, receipt, voucher, roll, account, claim, certificate, affidavit, or deposition, knowing the same to contain any fraudulent or fictitious statement or entry in any matter within the jurisdiction of any department or agency of the United States or of any corporation in which the United States of America is a stockholder, shall be fined not more than $10,000 or imprisoned not more than ten years, or both.

STATEMENT

On November 20, 1946, an indictment was filed against petitioners in the District Court for the Southern District of California charging that they knowingly caused false statements to be made in a matter within the jurisdiction of the War Assets Administration, in violation of Section 35A of the Criminal Code, *supra*. Count IV [2] alleged that petitioners caused one Byron N. Taylor to make false and fraudulent representations in a veteran's application for surplus property to the effect that he intended to engage in the oil transportation business and was purchasing trucks for his own use and not for the purpose of resale, whereas in truth he had no such intention and was purchasing the vehicles for the sole benefit of petitioners with funds advanced by them (R. 5-6).

[2] This is the only count now involved; petitioners were acquitted on the other three counts (R. 2-5).

The evidence for the Government may be summarized as follows:

A sale of surplus trucks and trailers was held by the War Assets Administration at Port Hueneme, California, from May 20, 1946, to August 23, 1946 (R. 110, 115). The sale was restricted to veterans of World War II until June 24, but thereafter the rules of eligibility were changed from time to time so that other groups (federal agencies, state and local governmental units, and non-profit institutions) participated with the veterans. Beginning July 2, licensed automobile dealers were permitted to participate with those previously eligible on a "first-come, first-served" basis. These classes of purchasers comprised the eligible list on July 11, 1946, the date of the alleged violation. (R. 112-114.)

Throughout the period of sale a limitation was imposed on the number of vehicles which could be purchased by any eligible buyer. At first, the maximum number was one vehicle; then, on May 27, it was changed to one vehicle in each of the several categories—trucks, trailers, tractors, etc.; and finally, on June 10, an over-all limit of 25 vehicles was imposed on every eligible buyer. (R. 112-113.)

In order to participate in the sale on the basis of veteran status, an applicant was required to complete and sign a "Veteran's Application for Surplus Property," and present it with papers

showing his discharge from military service. Upon finding that such documents were in order, an official of the War Assets Administration certified on a "Purchase-Requisition" that the applicant was entitled to a veteran's preference for the purchase of a specified number of vehicles. (R. 145-146.)

Petitioner Potolski, an automobile dealer, and petitioner Todorow, an export representative, both veterans of World War II, were certified in this manner for veteran's preference, and each of them purchased 25 dump trucks on June 26, 1946. As they were informed and knew, their quotas were exhausted by these purchases, for the limit at that time was 25 units to each purchaser. (R. 126-127, 146-150, 152-154, 217-220, 267-268, 298, 367-374.) They asked the manager of the sale if they could exceed this limit, but their request was refused (R. 120).

About two weeks later, on July 10, 1946, petitioners approached Byron N. Taylor, an elevator operator at the hotel where they were staying, and, after ascertaining that he was also a veteran, offered him $20 to accompany them to Port Hueneme to buy several trucks for them (R. 175-176). The next day petitioners drove Taylor and one Lauridsen, a parking attendant at the same hotel, to Port Hueneme and instructed each of them to purchase on petitioners' behalf six 800-gallon refueler trucks (R. 178, 183). When questioned by Lauridsen

about the legality of the proposed transaction, Potolski stated that he and Todorow were in the used car business and "had bought their limit of 25 trucks apiece and therefore were using other veterans' priorities" (R. 177). Upon arrival at Port Hueneme, Taylor, accompanied by petitioners and Lauridsen, went to the certification building and filled out a "Veteran's Application for Surplus Property" in which he falsely stated that he intended to go into the business of "transporting oil" as "soon as possible" under the trade name of "Byron N. Taylor" as an individual proprietorship (R. 183, 376). In fact he had no such intention (R. 185), and supplied this information after he had asked Todorow what business he should specify and had been advised that it was immaterial and that "anything would be sufficient" (R. 184). Taylor certified that he was "not procuring the property listed in this application for the purpose of resale; and that said property is to be used in and as part of the enterprise described herein" (R. 183, 376-377). The "Purchase-Requisition" form, which he also signed, contained a similar certification that "the vehicles I wish to purchase are for my own personal use or for the maintenance of my established business, profession or agricultural activity" (R. 380).

In reliance upon these misrepresentations, War Assets' certifying officer approved Taylor for a veteran's preference for the purchase of six trucks

(R. 379). When Todorow discovered that only one vehicle was designated by serial number on the Purchase-Requisition, he directed Taylor to go back and correct the discrepancy (R. 189). Taylor was unsuccessful in effecting the change himself and Todorow returned with him to the certification building and persuaded the official to execute an additional "Purchase-Requisition" to cover the five additional trucks for which Taylor had been certified (R. 189, 379). The authorizations by the War Assets Administration for the sale of six trucks were transferred by Taylor to petitioners (R. 193), and he received from them the $20 which they had agreed to pay (R. 195).

Lauridsen, who had similarly obtained approval to purchase vehicles, objected to signing a receipt for the $15 which petitioners tendered for his services (R. 194-195, 230). He expressed suspicion of the legality of the transactions in view of the secrecy which had attended them and was told by Potolski that "we didn't want it to look like you were buying them for us" (R. 196). Potolski attempted to reassure Taylor and Lauridsen by stating that if anything was wrong with the transactions, petitioners and not they "would get it in the neck" and that, in any event, it was only "petty larceny; that nothing great would come of it" (R. 198).

Petitioners did not complete the purchase of the six trucks under Taylor's authorization. Instead,

they destroyed the contractual documents after agents of the War Assets Administration interrogated them about their use of other veterans as intermediaries in purchasing trucks (R. 232-233, 291-293).

Petitioners were convicted on the charge of having caused Taylor to make false and fraudulent representations in a matter within the jurisdiction of the War Assets Administration (R. 35), and were each sentenced to imprisonment for two years and fined $3,000 (R. 41-44). The judgments were affirmed by the Court of Appeals for the Ninth Circuit (R. 416).

ARGUMENT

After detailed and elaborate consideration of petitioners' convictions and of the many errors charged, the Court of Appeals properly concluded that there exists no ground for reversal. Petitioners bring no point of substance to this Court and there is no occasion for further review.

1. One of petitioners' contentions (Pet. 24-31) is that the Government failed to prove that false statements were made "in any matter within the jurisdiction of any department or agency of the United States," as required by Section 35A of the Criminal Code, *supra* p. 3. This contention is clearly unsound.

The War Assets Administration was created [3] to dispose of surplus property in accordance with the

[3] Executive Order 8689, effective February 1, 1946, 11 F. R. 1265.

provisions of the Surplus Property Act of 1944.[4] Congress expressly authorized the Administrator to prescribe regulations to aid veterans in the acquisition of surplus property "for their own small business, professional, or agricultural enterprise."[5] Pursuant to this mandate, the Administrator issued a comprehensive regulation[6] dealing with the disposal of surplus property to veterans and other priority claimants, and providing that, except as to property to be resold in the regular course of their business, acquisitions by veterans should be "for their own use only and not for transfer or disposition by them to others, and disposal agencies may require priority claimants so to certify."[7] The Administrator authorized disposal agencies to establish "the maximum and minimum quantities which may be acquired by any one veteran at any one time during a given period of time."[8]

Section 8302.8(a) of Regulation 2 prescribed the procedure for veterans, as follows:[9]

> A veteran desiring to acquire property set aside under § 8302.4 or to exercise his priority under § 8302.5 shall apply to any certifying office of War Assets Administration and shall

[4] 58 Stat. 765, 50 U.S.C. App. 1611-1646.
[5] Act of May 3, 1946, 60 Stat. 168, amending Section 16 of the Surplus Property Act of 1944.
[6] War Assets Administration Regulation 2, 11 F. R. 5125, effective May 3, 1946.
[7] § 8302.9(b), 11 F. R. 5127.
[8] § 8302.4(b), 11 F. R. 5126.
[9] 11 F. R. 5126.

> furnish the Administration with complete information regarding the property desired. War Assets Administration will satisfy itself through reference to the applicant's discharge papers or to other satisfactory evidence that the applicant is a veteran and that the property applied for is for his own personal use or to enable him to establish or maintain his own small business, professional, or agricultural enterprise and shall require of the applicant a supporting statement or affidavit. War Assets Administration will issue an appropriate certificate to such veteran stating that he is a veteran entitled to purchase the types and quantities of the property described therein.

It is clear, therefore, that the false statements which Taylor, at petitioners' instigation, subscribed before the War Assets Administration on forms supplied by it were made directly in a "matter within the jurisdiction" of that agency of the United States. Cf. *Sanchez* v. *United States,* 134 F. 2d 279, 283 (C.A. 1), certiorari denied *sub nom. Tapia* v. *United States,* 319 U. S. 768; *Fuller* v. *United States,* 110 F. 2d 815, 817 (C.A. 9), certiorari denied, 311 U. S. 669.

Petitioners argue, in effect, however, that since some of the details governing the sale on July 11, 1946 (particularly the designation of eligible buyers and the limitations upon the maximum quantities available to any one purchaser) were not formally set forth in a general announcement of the War Assets Administration but were pre-

scribed on the spot by the local manager of the sale, petitioners had no opportunity to know that the false statements were in a matter within the jurisdiction of the agency or that the data was material to the performance of its functions. This contention ignores the basic requirement, of which petitioners were well aware, that veterans were entitled to participate in the sale *qua* veterans only if they obtained certification for veteran's preference in conformity with a prescribed procedure. Petitioners were familiar with this procedure since they themselves had complied with it a short time previously (R. 367-368, 371-372). They knew that Taylor was an elevator operator, not a dealer in automobiles, and that he could become eligible to purchase surplus property on July 11, 1946, only if he established a veteran's preference by representing in his application that he was purchasing the vehicles for his own personal use or for his own small business, professional or agricultural enterprise. *Supra,* pp. 4-5, 9-10. In inducing Taylor to secure the necessary certification by means of false representations and turn it over to them for their use, petitioners must have understood that the requirements prescribed by the War Assets Administration would be subverted.[10]

---

[10] The fact, upon which petitioners rely (Pet. 41-42), that the false information was submitted on a form originally used by the Smaller War Plants Corporation, one of the predecessors of the War Assets Administration, has no significance for, as petitioners knew, the sale was conducted at all relevant times by the latter agency, to which the representations were made.

Kraus & Bros. v. *United States,* 327 U. S. 614, with which the decision below is asserted to be in conflict (Pet. 24, 25, 29), is readily distinguishable. The *Kraus* case involved an application of the principle that administrative regulations which perform the function of defining the substance of criminal conduct must be explicit and unambiguous. Petitioners were charged, however, not with violations of any regulation of the War Assets Administration, but with having wilfully and knowingly caused false and fraudulent statements to be made in a matter within the jurisdiction of that agency, in violation of Section 35A of the Criminal Code. The trial court properly held that the written statements made by Taylor constituted matters within War Assets' jurisdiction (R. 336), and the verdict of the jury established that petitioners acted wilfully and knowingly in inducing Taylor to obtain certification as an eligible purchaser of surplus property on the basis of misrepresentations of his purpose and intention.

2. Petitioners' argument (Pet. 20-23) that the proof as to one element of the charge—the falsity of Taylor's statements—consisted solely of the testimony of Taylor, an accomplice, and was not sufficient as a matter of law, is without merit for several reasons. In the first place, as the Court of Appeals noted (R. 401), there was no dispute in the evidence that the statement that Taylor was purchasing the vehicles for his own use in establishing an oil transportation business was false.

Indeed, petitioners' own version of the facts implicitly admitted the falsity of Taylor's statements (see, e.g., R. 285-286). Consequently, there was no necessity for further corroboration. Even in strict perjury cases, the rule that the uncorroborated oath of one witness is insufficient for conviction applies only to the issue of the falsity of the testimony or statement. *Hammer* v. *United States,* 271 U. S. 620, 626; *Weiler* v. *United States,* 323 U. S. 606, 607; *Pawley* v. *United States,* 47 F. 2d 1024, 1026 (C. A. 9); 7 Wigmore, *Evidence* (3rd ed.), Sec. 2042, p. 280. And there is greater reason for applying this principle to prosecutions under Section 35A, which differs in pertinent respects from the normal perjury statute.

Moreover, there was in fact ample corroboration of Taylor's testimony. For example, petitioners' own admissions that they paid Taylor $20 (R. 230, 290) corroborated his testimony that the money was in payment for the purchase authorization procured on his false representations. Finally, even if it were true that the falsity of the statements rested solely upon the uncorroborated testimony of an accomplice, that fact would not impair the verdict. In *Caminetti* v. *United States,* 242 U. S. 470, 495, this Court approved the statement that "* * * it was the better practice for courts to caution juries against too much reliance upon the testimony of accomplices and to require corroborating testimony before giving credence to such evidence," but refused to invoke any "* * * absolute

rule of law preventing convictions on the testimony of accomplices if the juries believe them." The trial court carefully admonished the jury to receive the testimony of Taylor with caution and to weigh it with great care (R. 334-335). Petitioners were entitled to no more. They were indicted and tried for violations of the federal "false claims" act, and the considerations—growing out of the need to protect innocent witnesses from retaliation—which underlie the "uncorroborated witness" rule in ordinary perjury cases do not appear to apply to prosecutions under the statute involved here. Cf. *Weiler* v. *United States,* 323 U. S. 606, 609; opinion below, R. 401.

Petitioners' contention in essence is that the evidence was insufficient to support their convictions, but in view of the concurrent findings of the courts below on this point, no occasion is presented for an independent review of the sufficiency of the evidence by this Court. *Kann* v. *United States,* 323 U. S. 88, 93; *United States* v. *Johnson,* 319 U. S. 503, 518; *Delaney* v. *United States,* 263 U. S. 586, 589-590.

3. After instructing the jury that it was not necessary for the Government to prove that the allegedly false representations were false in all the particulars charged or that petitioners caused all of them to be made, the trial court stated: "* * * If you are convinced beyond a reasonable doubt from the evidence as to each count that one or more of the statements or representations charged in

each count was false as charged, and that the defendants knowingly and wilfully caused such false statement or representation to be made to the War Assets Administration, then knowing it to be false, the Government's burden of proof in this regard has been sustained" (R. 339).

Petitioners complain that this instruction impaired the requirement of unanimity for the jury's verdict. Their contention would have merit only if the quoted instruction could be construed as suggesting that some members of the jury, less than twelve, might find a particular statement false, while the remaining members might find another statement false, and that the combination of the two groups would suffice to meet the requirement of unanimity. But throughout the charge to the jury the court used the pronoun "you" in its collective sense, and the phrase, "If you are convinced beyond a reasonable doubt," in the quoted part, coupled with the subsequent instruction that "In order to return a verdict, it is necessary that each juror agree thereto. Your verdict must be unanimous" (R. 342), clearly admonished the jury that all members must agree that a particular one of the representations was false and that petitioners knowingly and wilfully caused it to be made.

In *Warszower* v. *United States,* 312 U. S. 342, 345, this Court said in a similar context: "As the trial court instructed the jury it might convict if any one of the statements charged in the indictment to be false were found false, it is necessary

before affirmance is justified to decide whether there was adequate evidence to support the charge of falsity as to each of the statements." Cf. *United States* v. *Mascuch,* 111 F. 2d 602 (C.A. 2), certiorari denied, 311 U. S. 650; *Levine* v. *United States,* 79 F. 2d 364, 369 (C.A. 9). In the instant case, as the Court of Appeals stated, "* * * There was substantial evidence in the record that all of the representations, made by Taylor, were false, as alleged in the indictment, and that appellants caused all of them to be made. If it be assumed, therefore, that the jury based its verdict on only one false representation, and it does not matter which one, there was substantial evidence to support the verdict" (R. 406).

4. Evidence was admitted showing that petitioners induced another veteran, Lauridsen, to accompany them to the sale to purchase trucks on their behalf, and petitioners contend that this constitutes reversible error (Pet. 45). But the trial court carefully instructed the jury that this evidence was received not to prove any of the transactions alleged in the indictment, but solely "for the purpose of determining the intent with which the defendants acted in doing the acts charged in any count of the indictment, if you find from the evidence that they did those acts, but you may consider it for no other purpose" (R. 160-161, 165-166, 411-2). Safeguarded by this precautionary instruction, the evidence of the closely-interwoven collateral offense was clearly admissible to prove

petitioners' intent in committing the offense charged. *Williamson* v. *United States,* 207 U.S. 425, 450-451; *Jones* v. *United States,* 258 U.S. 40, 48.

5. Petitioners also contend (Pet. 10, 32-37) that they were deprived of a fair trial because of prejudice on the part of the trial judge. They point to his denial of a request for a continuance of the trial; his action in remanding petitioners to the custody of the marshal during the first part of the trial; his admonitions to counsel during examination of witnesses; and his refusal to grant bail pending appeal. The Court of Appeals stated that, after carefully examining the record in the light of these contentions, it had concluded that the trial judge had not been biased and that petitioners had been given a fair trial with full opportunity to present their defenses (R. 413-414). And the instances of asserted "prejudicial misconduct" during the trial which petitioners specifically cite (Pet. 34-5) certainly do not bear out their allegation.

Petitioners were entitled to bail from the date of their arrest, November 21, 1946, to April 24, 1947, when the trial began (Rule 46, F.R. Crim. P.). They were at liberty on bail during that period. But as soon as the trial commenced the court had discretion to order them into custody to assure their continued presence during the trial. "It is an inherent power of the court and one to be exercised in its discretion the same as is the discre-

tionary power to keep the jury together in the custody of the marshal during the criminal trial." *United States* v. *Rice,* 192 Fed. 720, 721 (C.C.S.D. N.Y.) In view of the irresponsibility shown by petitioners in failing to be in court on the scheduled trial date and their ostensible attempts to delay the trial, the trial judge cannot be said to have acted arbitrarily in remanding them to custody and refusing a continuance. The indictment had been returned more than five months previously, and arraignment and plea had been deferred to the date of trial to accommodate petitioners. They were notified of the trial date, April 22, 1946, more than a month in advance (R. 50-51), and they stated they would be in court on that day (R. 92, 93). Nevertheless, Todorow did not leave New York for California until the evening of April 21 (R. 82) and, although Potolski allegedly had been under medical care for more than a year (R. 65), it was not until the morning of April 22 that his counsel presented a medical excuse for his absence on that day. When this excuse was rejected, Potolski flew from New York to Los Angeles the night of April 22 (R. 82). These circumstances offered strong support for the trial judge's suspicions that petitioners were resorting to dilatory tactics, and that expedition of the trial would be served by holding them in custody.

Whether or not the trial judge was justified in remanding petitioners to custody, however, it does not appear that they were prejudiced by his action.

Although local counsel who represented petitioners at the trial did not enter the case until April 19, 1947, they had previously been represented by other counsel in the East (R. 48, 93-94). Moreover, the trial judge afforded counsel full opportunity to confer with petitioners while they were in custody (R. 134).[11] Petitioners' situation did not differ from that which normally prevails when defendants who cannot raise bail remain in custody during trial.

CONCLUSION

For these reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

PHILIP B. PERLMAN,
Solicitor General.
ALEXANDER M. CAMPBELL,
Assistant Attorney General.
ROBERT S. ERDAHL,
HAROLD D. COHEN,
Attorneys.

MAY 1949.

---

[11] It does not appear from the record exactly how long petitioners remained in custody, but on April 28, 1947, the day before the Government rested its case, Todorow, and presumably Potolski also, were at large (R. 295-296).

☆ U. S. GOVERNMENT PRINTING OFFICE: 1949 656288 634